STATE OF MICHIGAN

COURT OF APPEALS

INTRASTATE DISTRIBUTORS, INC., Plaintiff-Appellant,	UNPUBLISHED December 22, 2005
v	No. 263148 Wayne Circuit Court
NBTY MANUFACTURING, L.L.C., and REXALL SUNDOWN, INC., Defendants-Appellees.	LC No. 03-339551-CK

Before: Whitbeck C.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants. We affirm.

We review de novo a trial court's decision on a motion for summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). Limiting our review to the record developed in the trial court, *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990), plaintiff has not established any basis for disturbing the trial court's grant of summary disposition in favor of defendants under MCR 2.116(C)(10) with regard to whether defendant Rexall Sundown, Inc. (Rexall), breached the distribution contracts for the Michigan and Chicago, Illinois, area markets.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley, supra* at 278. Evidence offered in support of or in opposition to the motion is only considered to the extent that it is substantively admissible. MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The evidence is viewed in a light most favorable to the nonmoving party to determine whether a genuine issue of a material fact was established and whether the moving part was entitled to judgment as a matter of law. *Corley, supra* at 278.

Although plaintiff's complaint broadly alleges breaches of various different contract terms, plaintiff's argument on appeal focuses on alleged contract provisions governing termination of the distribution contracts. We do not consider other alleged breaches that were raised below, but are not addressed on appeal. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). And when a party gives an issue

cursory treatment, with little or no supporting authority, the issue is deemed abandoned. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Further, although plaintiff asserts that defendants violated both statutory and common-law standards, plaintiff does not address any statutory provisions applicable to its status as a distributor of Rexall's products to retailers in the Michigan and Chicago areas. Defendants cite *Aaron E Levine & Co v Calkraft Paper Co*, 429 F Supp 1039, 1050 (ED Mich, 1976), which considered both common-law principles and MCL 440.2309 of the Michigan Uniform Commercial Code (UCC), but because neither party argues that plaintiff's breach of contact claim is subject to the UCC, we shall analyze plaintiff's claims under common-law contract principles. Any claim that the UCC applies is deemed abandoned because it is insufficiently briefed by the parties. *Prince*, *supra* at 197.

The trial court determined, and we agree, that the proffered evidence established an oral distribution agreement between Rexall and plaintiff with respect to the Michigan and Chicago areas. A valid contract requires mutual assent with respect to all essential terms. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). A meeting of the minds must exist regarding all material facts. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). A meeting of the minds is judged by an objective standard, looking to the parties' express words and visible acts, rather than a subjective state of mind. *Id*.

The material question in this case is whether the parties reached an agreement with respect to the duration and manner of termination of their oral distribution agreements. If the parties did not have the requisite meeting of the minds with regard to termination, the law may supply this detail by construction. In general, so long as the parties define the contract's essential terms, the law supplies the missing details of performance by construction. *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1941). When there is no express provision concerning the duration of a contract, or the manner of termination, the law may imply that the contract is terminable at will. See *Lichnovsky v Ziebart Int'l Corp*, 414 Mich 228, 236; 324 NW2d 732 (1982); *Aaron E Levin & Co*, *supra.*

Viewing the evidence in a light most favorable to plaintiff, we conclude that plaintiff failed to establish a genuine issue of material fact regarding whether it and Rexall agreed to terms governing the termination of their relationship with respect to the Michigan area and, in particular, whether an express oral contract existed that would allow Rexall to terminate plaintiff's distribution contract for the Michigan area only for just cause and impose upon Rexall the added burden of making an "equity buyout" in the event of termination.

Plaintiff gives undue weight to MRE 801(d)(2)(D) to argue that statements made by Rexall's agent, Chris Conrad (Conrad), amounted to admissible evidence on this question. Whether MRE 801(D)(2)(D) applies depends on the particular statement offered into evidence and its purpose. Because the relevance of oral utterances offered to establish the formation of a contract lies in the fact that the statements were made, rather than the truth of the matter asserted, they are not objectionable as hearsay. See generally *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998), abrogated in part on other grounds by *Molloy v Molloy*, 247 Mich App 348; 637 NW2d 803 (2001). As explained in 2 McCormick, Evidence (5th ed), § 249, p 100:

> When a suit is brought for breach of a written contract, no one would think to object that a writing offered as evidence of the contract is hearsay. Similarly, proof of oral utterances by the parties in a contract suit constituting the offer and acceptance which brought the contract into being are not evidence of assertions offered testimonially but rather verbal conduct to which the law attaches duties and liabilities.

Therefore, to the extent that plaintiff offered evidence of Conrad's statements to establish the formation of an oral contract, the statements were admissible, independent of MRE 801(d)(2)(D). But evidence of Conrad's authority, actual or apparent, to bind Rexall to an oral contract containing terms governing termination was still required. *Meretta v Peach*, 195 Mich App 695, 698-699; 491 NW2d 278 (1992). "The apparent authority of an agent to speak on behalf of a principal may not be established by the acts and conduct of the agent alone." *Przeradski v Rexnord, Inc*, 119 Mich App 500, 504; 326 NW2d 541 (1982), remanded for reconsideration on other grounds 417 Mich 1100.19 (1983).

In this case, however, it is not material whether Conrad had actual or apparent authority to bind Rexall to an oral contract containing "just cause" for termination or "equity buyout" terms because the evidence, viewed in a light most favorable to plaintiff, did not establish that Conrad orally agreed to such terms for the Michigan area. The deposition testimony of plaintiff's officer, Amer Dabish (Amer), established that he left the group distributor meeting at Rexall's office in November 2000, with the understanding that Rexall had not finalized details of the distribution contracts that would be offered to distributors. Amer testified that Conrad told a distributor who inquired about a written contract, "it's in the works. It's coming. You'll get it. It's coming." William Dabish (William) similarly testified in his deposition that Conrad said, "we're adjusting our new contracts, you guys have got to be patient. We'll get them to you."

Amer's subsequent affidavit was inconsistent with his deposition testimony because it suggests that an oral contract was formed as a result of one-on-one negotiations, rather than as a result of the group distributor meeting. A party "may not contrive factual issues by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001) (citations omitted). Further, Amer's affidavit contained only a conclusory assertion that Conrad "promised" that "the contract would recognize an equity buyout provision." "The affidavits must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion." *SSC Assocs Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

Amer did not provide specific statements made by Conrad, or their context, to permit an objective analysis of whether Conrad made an offer during one-on-one negotiations and, if so, its acceptance by Amer. A contract is not complete unless there is an offer and acceptance. *Eerdmans, supra* at 364. Nor did Amer's averments in his affidavit support an inference that the parties negotiated any terms of an "equity buyout." It was silent with respect to the duration of the distribution contract.

The deposition and affidavit of plaintiff's other officer, Thamer Dabish (Thamer), likewise do not aid plaintiff in establishing that a meeting of the minds was reached between plaintiff and Rexall, through their agents, with respect to terms for terminating the distribution

contract in the Michigan area. Thamer admittedly was not involved in the November 2000 negotiations, but rather had contact with Conrad in the latter part of 2001, when negotiating the distribution contract for the Chicago area. Thamer's conclusory averment in his affidavit that Conrad guaranteed a written, formal contract for the Michigan market during those negotiations was insufficient to create a genuine issue of material fact. *SSC Assocs Ltd Partnership, supra* at 364.

Viewed in a light most favorable to plaintiff, the evidence established that the parties had an oral distribution contract for the Michigan area, which plaintiff acted on by ordering Rexall's products and reselling them to retailers, but that the parties did not agree to any terms governing the termination of this contractual relationship. Even if we were to consider Amer's averment about the "equity buyout" provision, it did not create a genuine issue of material fact to avoid summary disposition. At most, there was evidence of an oral agreement to enter into a written contract in the future for the Michigan area, or perhaps more accurately to modify the initial contractual arrangement in the future for added detail on such topics as an "equity buyout."

Parties may agree to execute a contract in the future, *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982), or may agree to modify an existing contract by reaching a meeting of the minds, *Univ Leaseway Sys, Inc v Herrud & Co*, 366 Mich 473, 478; 115 NW2d 294 (1962). But because the evidence here failed to establish a meeting of the minds with regard to the "equity buyout," it fails for indefiniteness. *Opdyke Investment Co, supra* at 359. "To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations." *Heritage Broadcasting Co v Wilson Communications*, Inc, 170 Mich App 812, 819; 428 NW2d 784 (1988).

Because plaintiff and Rexall, through their agents, did not agree on the terms for terminating their contractual relationship, the trial court properly ruled as a matter of law that the distribution contract with respect to the Michigan area was terminable at will. Plaintiff's claim that an "equity buyout" attached to the termination of the agreement likewise fails as a matter of law.

We reach this same conclusion with respect to the oral distribution agreement for the Chicago area. The conclusory averments in Thamer's affidavit regarding Conrad's promises did not provide the requisite objective evidence for evaluating whether an oral contract containing terms with respect to termination was reached for the Chicago area agreement. *Kamalnath, supra* at 548; *SSC Assocs Ltd Partnership, supra* at 364. Thamer's deposition testimony indicated that he gave the words "equity" and "just cause" to Conrad during negotiations and that Conrad acknowledged them. But the testimony does not support that a meeting of the minds occurred with regard to any "just cause" or "equity" provision. Contracting parties are generally free to contract as they see fit. *Rory v Continental Ins Co*, 473 Mich 457, 469; 703 NW2d 23 (2005). Rather, Thamer indicated that he was looking to Conrad to address these topics in a written contract and to provide performance guidelines. He also expressed an expectation that future negotiations might be necessary, as reflected in his testimony that "if it was an ugly agreement, I don't know. I mean all I know is we agreed we would have these items, these, you know, these topics covered." Consistent therewith, the evidence of the November 20, 2001, letter agreement provided by Conrad to Thamer indicated that he had not assented to terms

governing termination, but rather to negotiating for such terms for inclusion in a future written contract.

Viewed in a light most favorable to plaintiff, the evidence established, at most, an agreement to enter into a future contract containing the alleged termination terms. Because the parties never agreed on these material and essential terms for termination, the trial court correctly ruled as a matter of law that the distribution contract for the Chicago area was terminable at will.

Because the distribution contract for each area was terminable at will, it is unnecessary to address plaintiff's claim that Rexall did not have just cause to terminate the distribution contract for the Michigan area, or end plaintiff's exclusive distributorship for the Chicago area.

Turning to plaintiff's claim that Rexall fraudulently induced it to take the Michigan and Chicago markets, the record reflects that defendants moved for summary disposition with respect to this issue under both MCR 2.116(C)(8) and (10). Unlike MCR 2.116(C)(10), a motion under MCR 2.116(C)(8) is tested solely by the pleadings. *Maiden, supra* at 119. The circumstances constituting fraud must be pleaded with particularity. MCR 2.112(B)(1). In this case, we need not decide whether the allegations in plaintiff's complaint were sufficient to state a claim for fraud. Even assuming that plaintiff sufficiently stated a fraudulent inducement claim, summary disposition was proper under MCR 2.116(C)(10) because plaintiff failed to establish factual support for its claim.

"Fraud in the inducement occurs when a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). Our Supreme Court has held that future promises ordinarily do not constitute fraud because they are contractual in nature, but there is an exception for promises made in bad faith. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336-338; 247 NW2d 813 (1976). The rule, as stated in *Hi-Way Motor Co, supra* at 337-338, citing *Crowley v Langdon*, 127 Mich 51, 58-59; 86 NW 391 (1901), is that "a fraudulent misrepresentation may be based upon a promise made in bad faith without intention of performance." The evidence of fraudulent intent must relate to conduct at the time that the representation was made or almost immediately thereafter. *Hi-Way Motor Co, supra* at 338-339. Thus, plaintiff must show that Rexall did not intend to fulfill the promise at the time the promise was made. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 379; 689 NW2d 145 (2004). "Intent is a mental condition, which is determined not so much by what one says as it is by what one does." *Foreman v Foreman*, 266 Mich App 132, 143; 701 NW2d 167(2005) (citation omitted).

Here, the evidence offered by plaintiff in opposition to defendants' motion did not establish the oral promises alleged by plaintiff with respect to termination. Further, unlike *Jim-Bob, Inc v Mehling*, 178 Mich App 71; 443 NW2d 451 (1989), cited by plaintiff, the instant case does not involve a situation in which the defendant claimed that a writing was required for plaintiff to enforce its contract. Nonetheless, plaintiff relies on Amer's deposition testimony regarding Conrad's representation at the November 2000 meeting that a writing would be provided as factual support for its claim of a bad faith promise actionable in fraud.

Viewed in a light most favorable to plaintiff, the evidence was insufficient to raise a reasonable inference that Conrad made his representation in bad faith or to otherwise establish a

genuine issue of material fact. Hence, although the trial court did not mention the bad-faith standard and referred only to plaintiff's allegations of future promises in its decision, we uphold its decision because the right result was reached. *Ireland v Edwards*, 230 Mich App 607, 625 n 16; 584 NW2d 632 (1998).

Plaintiff's assertion that the facts support a claim of innocent misrepresentation is not properly before this Court because plaintiff did not raise this claim in the statement of the questions presented. MCR 7.212(C)(5); *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). In any event, the bad faith exception does not apply to a claim of innocent misrepresentation. *Derderian, supra* at 381. Therefore, this claim was properly dismissed.

We decline to address plaintiff's final two issues concerning its claim for unjust enrichment and the liability of NBTY Manufacturing, L.L.C., because plaintiff fails to cite any authority in support if its arguments. *Peterson Novelties, Inc, supra* at 14; *Prince, supra* at 197.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray